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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re A. S., a Person Coming Under the
Juvenile Court Law.

B206470

(Los Angeles County
Super. Ct. No. JJ13666)

THE PEOPLE,

Plaintiff and Respondent,

v.

A. S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Robert S. Ambrose, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Leslie G. McMurray, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Roberta
Davis and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A.S. (the minor) appeals from an order declaring him a ward of the court and ordering him to be suitably placed after finding he had exhibited an imitation firearm. The minor contends the evidence is insufficient to support the finding. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On January 11, 2008, a Welfare and Institutions Code section 602 petition was filed alleging the minor, then 15 years old, had unlawfully possessed a firearm (Pen. Code, 12101, subd. (a)(1)),¹ a felony, and had exhibited an imitation firearm (§ 417.4), a misdemeanor.

1. Jurisdiction Hearing

a. The People's evidence

Rosalinda Terrazas was driving down an unlit alley on the evening of December 26, 2007, when she saw the minor and a companion walking in front of her car. Terrazas pulled up to the gate of her driveway. The minor stopped about seven feet away from the driver's side of the car. He reached into his waistband and extended his arm in front of him. His right hand was in a fist, with the thumb pointed down. Terrazas testified she was frightened because what "looked like a gun" was in the minor's right hand, and it was pointed towards her. The minor said Terrazas had scared him. Terrazas told the minor that was the first and last time he could do something like that to her. She went to her house to contact police.

Terrazas testified it was too dark to see the color, size and shape of the gun; she just saw what looked like a gun pointed at her. During the hearing, the court asked Terrazas, "What made you think that it was a gun?" Terrazas answered, "Well, because, for one, who's going to go like this and then go like this if you don't have nothing?" The court sought further clarification, "All right. So it was the gesture itself -- as opposed to what you saw?" Terrazas answered, "Exactly . . . Yes. Because why would you go like this? . . ." Terrazas added, "I live around plenty of gang members; so I know what

¹ Statutory references are to the Penal Code unless otherwise indicated.

they're about and how they react, you know.” Finally, the court inquired, “What I want to make sure is: Did he make the gesture with something in his hand or was there nothing in his hand?” Terrazas confirmed there was something in the minor’s hand. Terrazas testified she did not know guns, but it appeared to be a smaller one. Terrazas did not see the object she thought was a gun before the minor reached into his waistband.

b. The defense evidence

The minor testified he was walking with a friend down the alley when he saw a car coming towards them. Fearing the car would strike them, the minor warned his friend to move out of the way. The car stopped, and Terrazas got out. The minor was angry and scared. He cursed Terrazas and flicked both his hands at her, as if to say, “Get away from me.” At the time, the minor was holding his Ipod, which he always carries in one hand. The minor denied having a gun in his hand at the time.

c. The juvenile court’s findings

The juvenile court found the possession of a firearm by a minor allegation not true and the exhibition of an imitation firearm true.

2. The Disposition Hearing

The juvenile court adjudged the minor a ward of the court, declared the offense to be a misdemeanor and calculated the maximum period of physical confinement as six months. The court ordered the minor detained at juvenile hall, pending suitable placement.

DISCUSSION

1. The Standard of Review

The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404; *In re Jose R.* (1982) 137 Cal.App.3d 269, 275.) In either case we view the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) The

defendant's conviction will be upheld if, viewing the entire record in that light, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citations.] In making this assessment the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts. [Citations.]” (*People v. Holt* (1997) 15 Cal.4th 619, 667.)²

1. *There is No Substantial Evidence that the Minor Exhibited an Imitation Firearm*

Section 417.4 provides: “Every person who, except in self-defense, draws or exhibits an imitation firearm, as defined in Section 12550, in a threatening manner against another in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a misdemeanor punishable by imprisonment in a county jail for a term of not less than 30 days.” Section 12550, subdivision (c) defines imitation firearm as “any BB device, toy gun, replica of a firearm, or other device that is so substantially similar in coloration and overall appearance to an existing firearm as to lead a reasonable person to perceive that the device is a firearm.”

The sole evidence that what the minor possessed was an imitation firearm was Terrazas's testimony. According to Terrazas, during the confrontation, the minor pulled an object from his waistband and pointed it at her. From this gesture, alone, Terrazas determined the object in the minor's hand was a gun.³ While Terrazas's testimony

² “Substantial evidence” in this context means “evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 [““When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”” [Citations.]”].)

³ Terreza did not testify that she felt threatened by the tone or words used by the minor in telling Terreza that she had frightened him. Although Terrazas suggested the

reflected an honest belief the minor was holding a gun, it did not reasonably support a finding that a reasonable person would have perceived that he was holding a firearm.

In re Michael D. (2002) 100 Cal.App.4th 115 tracked the Legislative history of section 417.4, noting that section 417.2, the precursor statute, prohibited exhibiting “a replica of a firearm in a threatening manner . . . in such a way as to cause a reasonable person apprehension or fear of bodily harm. . . .” (*Id.* at p. 121.) However, in 1993, the Legislature substituted “imitation firearm” for “replica of a firearm” in drafting section 417.4, and added that the imitation firearm must be “so substantially similar in physical properties to an existing firearm as to lead a reasonable person to conclude that the replica is a firearm.” (*Id.* at pp. 121-122.) The result is “the prohibited device is no longer defined in terms of what the person against whom the device is drawn reasonably perceives it to be.” (*Id.* at p. 122.) Instead, the reasonableness of that person’s perception is considered in light of evidence of the similarity of the device’s physical properties (coloration and overall appearance) to a real firearm. No such corroborating evidence exists here. Terrazas testified that it was too dark for her to discern the color, shape or size of the gun she saw in the minor’s hand and that she was unfamiliar with guns.

Acknowledging these deficiencies in the record, the People nonetheless rely on *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (*Monjaras*) to argue Terrazas’s belief the minor had some kind of smaller gun, was sufficient evidence to support the juvenile court’s finding. However, *Monjaras* is of no help to the People. In that case, it was undisputed the defendant had committed robbery using a gun. The issue was whether the gun held by him during the robbery was a real or imitation firearm. The *Monjares* court concluded, “As the old saying goes, ‘if it looks like a duck, and quacks like a duck, it’s a duck.’ The pistol tucked into defendant’s waistband looked like a firearm, and it in effect communicated that it was a firearm when defendant menacingly displayed it and ordered

minor was a gang member, there was no evidence of the minor’s gang membership or the alleged offenses were committed for the benefit of a gang.

the victim to give him her purse. While it is conceivable that the pistol was a toy, the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm and that he was prepared to shoot the victim with it if she did not comply with his demand. [Citation.] [¶] Simply stated, when as here a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b).” (*Monjares, supra*, 164 Cal.App.4th at pp. 1437-1438.)

By contrast, the People's evidence in the present case established only that the minor was holding an object in his hand. Nothing suggests it was an imitation firearm as opposed to a real firearm, or an Ipod as opposed to a pack of cigarettes. We agree with the juvenile court the evidence was insufficient to support the finding the minor unlawfully possessed a firearm within the meaning of section 12101, subdivision (a)(1). However, we fail to see how this same evidence proves what the minor possessed instead was an imitation firearm under section 417.4.

DISPOSITION

The order under review is reversed.

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ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.